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No. 86-1217

In The

Supreme Court of the United States

October Term, 1986

JOSEPH P. RUSSONIELLO, *et al.*,

Petitioners,

v.

JOSE J. OLAGUES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANTONIA HERNANDEZ
E. RICHARD LARSON
DENISE M. HULETT
Mexican American Legal Defense and Education Fund
604 Mission Street, 10th Flr.
San Francisco, CA 94105
(415) 543-5598

RONALD T. VERA
200 S. Garfield
Suite 200
Alhambra, CA 91801
(213) 283-0185

ALAN L. SCHLOSSER*
MARGARET C. CROSBY
EDWARD M. CHEN
American Civil Liberties Union of Northern California, Inc.
Suite 460
1663 Mission Street
San Francisco, CA 94103
(415) 621-2493

STEFAN M. ROSENZWEIG
California Rural Legal Assistance
Suite 401
2111 Mission Street
San Francisco, CA 94110
(415) 864-3414

Attorneys for Respondents

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

The respondents, an American citizen of Hispanic descent and three organizations involved in voter registration of Hispanic and Chinese-American citizens, were the subjects of a criminal investigation which explicitly and intentionally targeted Spanish-speaking and Chinese-speaking voters and selected individuals within these groups based solely on the exercise of their protected right to request bilingual voting materials. The questions sought to be presented are:

1. Whether Article III of the Constitution is an absolute barrier to judicial consideration of equitable or monetary claims arising from law enforcement investigative activities pursuant to an investigation that explicitly targeted Hispanic and Chinese-American individuals and groups based on the exercise of protected voting rights, and imposed special citizenship verification procedures on this racially-defined segment of the electorate.

2. Whether principles of equity bar a federal court from granting equitable relief against such a facially discriminatory criminal investigation which targets individuals based on their exercise of fundamental voting rights, when there is no criminal prosecution pending or imminent.

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STATUTES INVOLVED

California Government Code, 6253.6 provides:

(a) Notwithstanding the provisions of Sections 6252 and 6253, information compiled by public officials or public employees revealing the identity of persons who have requested bilingual ballots or ballot pamphlets, made in accordance with any federal or state law, or other data that would reveal the identity of the requester, shall not be deemed to be public records and shall not be provided to any person other than public officers or public employees who are responsible for receiving those requests and processing the same.

(b) Nothing contained in subdivision (a) shall be construed as prohibiting any person who is other-

wise authorized by law from examining election materials, including, but not limited to, affidavits of registration, provided that requests for bilingual ballots or ballot pamphlets shall be subject to the restrictions contained in subdivision (a).

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STATEMENT OF THE CASE

On April 19, 1982, three weeks before the close of voter registration for the 1982 California primary election, a criminal investigation of Chinese-speaking and Spanish-speaking voters, as well as individuals and organizations who were assisting and encouraging voter registration in the Chinese and Hispanic communities, began. The investigation, which was launched by petitioner Russoniello, the United States Attorney of the Northern District of California, was a cooperative law enforcement effort of the Immigration and Naturalization Service ("INS"), the Federal Bureau of Investigation ("FBI") and the district attorneys and voting registrars of nine Bay Area counties.[1]

The initial subjects of the investigation were defined by three criteria: they were (1) recently registered, (2) foreign born, and (3) had requested voting materials in Spanish or Chinese that were available pursuant to the federal Voting Rights Act. The U.S. Attorney requested

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[1]The district attorneys and voting registrars of each of the nine counties were defendants and appellees in the action below, together with the United States Attorney and the District Director of INS (the petitioners in this Court). None of these local officials is seeking review in this Court of the decision below.

that the district attorneys of each county randomly select twenty-five persons meeting these criteria, and these persons then had their citizenship status investigated by the INS and the FBI through the use of fingerprint indices and immigration records. Unless this record check produced positive confirmation of citizenship, such individuals were subjected to further investigation by local law enforcement officials or the FBI. (Pet. App. at 21a). The individuals under investigation were required to establish their citizenship, and, if unable to do so, they were questioned concerning the identity of the individual or organization who had assisted them in the registration process. (Pet. App. at 4a, n.3, 5a).

Russoniello stated that he was not interested in prosecuting ineligible registered voters, but that county officials could prosecute them under state law. The focus of the U.S. Attorney's concern was to prosecute groups or individuals who had fraudulently registered bilingual voters. (Pet. App. at 3a, 14a).

To the extent developed in the facts in the record below, the impetus for commencing an investigation which targeted only persons requesting Spanish or Chinese bilingual ballots was an earlier investigation by the Santa Clara District Attorney that had uncovered instances where non-citizens had been registered to vote. (Pet. App. at 3a). That investigation, however, had not been of persons requesting bilingual ballots, and revealed no problem concerning registration by bilingual ballot users. Rather, the Santa Clara study was an investigation of all foreign-born voters in one election district in the City of San Jose. (*Id.*)

Russoniello justified focusing on only Chinese-speaking and Spanish-speaking voters by referring to "voter

registration drives recently undertaken to register those voters and the fact that the Spanish language voter registration materials did not accurately translate the requirement that a voter must be a citizen." (Pet. App. at 4a).

A number of individuals and public officials "expressed concern that the timing of the investigation and its focus on particular racial groups would have an intimidating effect on their right to vote." (Pet. App. at 4a).[2] To the extent developed in the limited proceedings below, the "record provides support" (Pet. App. at 22a) for respondents' claims that these law enforcement actions against Chinese-speaking and Spanish-speaking individuals and groups intimidated and discouraged persons from participating in the voter registration drives of respondent organizations and from registering to vote and requesting bilingual ballots. The record also demonstrated a decline in new registration in the first weeks of the election campaign. (Pet. App. at 5a, 7a. 13a-14a, 20a, 22a-23a).

Based on the results of the INS record checks,[3] petitioner Russoniello sought to have 113 persons subjected to further investigation and citizenship verification by either

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[2]For example, March Fong Eu, Secretary of State of California, wrote to Russoniello on May 4, 1982 and expressed concern that this discriminatory investigation raised serious questions of law and policy, and would result in discouraging persons of "Hispanic and Chinese heritage" from registering. (Pet. App. at 4a, n.4).

[3]This procedure was followed in spite of the fact that the earlier Santa Clara study relied on by Russoniello noted that 29 out of 30 persons reported as aliens as a result of INS record checks were in fact citizens, and concluded that INS records were "out of date, incomplete and inadequate." (Clerk's Record on Appeal 106, Exhibit E).

local officials or the FBI. This investigation did not produce evidence of criminal conduct by any individual or group, and it was terminated.

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REASONS WHY THE WRIT SHOULD BE DENIED

Succinctly stated, respondents in this case were subjected to a criminal investigation which explicitly and intentionally targeted two national origin groups, and which focused and imposed burdens upon individuals within these groups based solely on their exercise of voting rights provided for by Congress to remedy "pervasive" discrimination against these groups.[4]

Notwithstanding petitioners' broad arguments presented here (but not below), neither Article III nor equity principles bar adjudication of this challenge to a "form of

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[4] "The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices."

42 U.S.C. § 1973b(f)(1); *see also* 42 U.S.C. § 1973aa-1a.

criminal investigation directed against [a] plaintiff because of his race." *Hall v. Pennsylvania State Police*, 570 F.2d 86, 91 (3rd Cir. 1978). Apart from the inapplicability of petitioners' arguments to this case, the posture of this case primarily makes it inappropriate for review by this Court.

I. THE POSTURE OF THIS CASE MAKES IT PREMATURE AND INAPPROPRIATE FOR PLENARY REVIEW.

Petitioners seek to have this Court grant plenary review of the Court of Appeals' interlocutory order remanding this case to the District Court. This Court's practice, however, is not to review cases prior to a final decree, "except in extraordinary cases." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The posture of this case vividly demonstrates the wisdom of avoiding plenary review prior to the development of a full factual record, and consideration of the legal arguments and of intervening developments by the courts below in the first instance.

A. The Absence of a Factual Record, Particularly in View of Petitioners' Assertion of New Arguments Never Raised Before or Addressed by the Courts Below, Makes the Interlocutory Decision Presented for Review Wholly Inappropriate for this Court's Consideration.

On May 24, 1982, less than three weeks after the complaint in the instant action was filed, the District Court accepted petitioners' argument that a federal court has no subject matter jurisdiction to enjoin a prosecutorial investigation, and dismissed respondents' claim for injunctive relief. (Pet. App. at 96a-97a). The Court of Appeals

reversed this dismissal, ruling only that there was subject matter jurisdiction, and then properly remanded "this issue to the district court to determine whether an injunction should issue." (Pet. App. at 15a). There was no factual record on the issue of injunctive relief, nor is there yet such a factual record.

The Court of Appeals also did not reach the merits of the substantive claims. The Court remanded respondents' claim of denial of the fundamental right to vote, finding that respondents had raised a "material issue of fact" as to whether the investigation intimidated registration and requests for bilingual voting materials by Chinese-speaking and Spanish-speaking persons. (Pet. App. at 20a). The court also found that the "record provides support" for respondents' First Amendment claim that the investigation directly interfered with associational activities and that respondents had raised "a material issue of fact as to the extent of the burden on the [respondents'] First Amendment interests." (Pet. App. at 22a-23a). The court also remanded the equal protection claim for findings as to whether petitioners' targeted investigation of two national origin groups met constitutional standards. (Pet. App. at 19a).

Thus, this case is now before this Court without the benefit of findings of fact, and the issues raised by petitioners are not presented with the "clarity, precision and certainty" that would be provided by a fuller record. *Rescue Army v. Municipal Court*, 331 U.S. 549, 576 (1947); *see also, e.g., Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588, n.2 (1972) ("When the issues are not presented with the clarity needed for effective adjudication, appel-

late review of a federal court judgment is every bit as inappropriate as was review of a state court judgment in *Rescue Army.*"); *Minnick v. California Dept. of Corrections,* 452 U.S. 105, 123 (1981); *Cowgill v. California,* 396 U.S. 371 (1970) (Harlan, J., conc. op.).

Petitioners do not argue (as they did below) that federal courts lack jurisdiction to enjoin a pre-indictment investigation by a prosecutor. Rather, they now argue *for the first time* that Article III deprives a federal court of the power to adjudicate damages as well as equitable claims arising from law enforcement investigations. (Pet. at 12). Furthermore, the determinative criterion for petitioners' expansive assertion of absolute nonjusticiability is no longer whether the investigation is in the pre-indictment stage, but whether it is "mature, coercive governmental action." (Pet. at 17). Thus, petitioners now ask for the first time in this case that a judicial bright line be drawn through a spectrum of pre-indictment investigatory activities to determine when such activities have become sufficiently "mature" and "coercive" to warrant judicial review. But the drawing of any lines is difficult at best without a factual record in which to apply petitioners' newly articulated test, and should not be considered in the first instance by this Court. *See Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 147, n.2 (1970).

Similarly, the lower courts never ruled on the propriety of injunctive relief, and petitioners' argument with respect to the propriety of injunctive relief is integrally

entwined with the facts of this case.[5] Petitioners now enunciate a standard that must be met for the issuance of equitable relief—the requirement of "extraordinary circumstances"—and they argue that "no such extraordinary circumstances exist here." (Pet. at 24). Petitioners in effect ask this Court for an advisory opinion to determine the standard for enjoining a racially-explicit law enforcement investigation impacting on fundamental rights, without the benefit of a developed factual record, and without a determination by the lower courts of this issue.

Furthermore, the Court should not determine whether the circumstances in this case were "extraordinary" enough to merit injunctive relief (even assuming that that standard is correct) without the "clarity, precision and certainty" provided by factual findings from a fully developed record. Petitioners argue that the "chilling effects" suffered by respondents did not constitute sufficient

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[5]This Court's determination of similar issues of justiciability and injunctive relief in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), was made on the basis of a factual record. The district court in *Lyons* initially granted defendants' motion for partial summary judgment, dismissing plaintiffs' claims for equitable relief based on the absence of a true case or controversy. This decision was reversed by the Ninth Circuit, which held that there was a controversy within the meaning of Article III, and remanded the case for further proceedings. 615 F.2d 1243 (9th Cir. 1980). At this juncture, *Lyons* was in the identical posture as the instant case. This Court then denied the City's petition for certiorari. 449 U.S. 934 (1980). The case then proceeded to hearing below on the issue of injunctive relief. The district court issued findings of fact and a preliminary injunction, and the Ninth Circuit affirmed. 656 F.2d 417 (9th Cir. 1981). This Court then granted certiorari and reversed. 461 U.S. 95 (1983). In ruling that plaintiffs were not entitled to injunctive relief, the Court considered and relied on the "record and findings made on remand." 461 U.S. at 110.

injury to constitute "extraordinary circumstances." (Pet. at 24-25). The claims of respondents, however, far exceed subjective "chilling effects"; the organizational respondents alleged that the investigations targeted against them resulted in intimidation and a consequent loss of membership participation in their critical voter registration drive in the midst of an election campaign and a refusal of Hispanic and Chinese-American citizens to register and request bilingual ballots. (Pet. App. at 5a, 7a, 13a-14a, 20a, 23a). The actual extent of the injuries caused by petitioners' interference with the exercise of fundamental rights, and whether these injuries were "reparable by the termination of the investigation" (Pet. at 25), is not yet a matter of record, which correctly led the Court of Appeals to recognize that this was a "material issue of fact" to be resolved by the District Court. (Pet. App. at 20a, 23a).[6]

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[6]The full extent and impact of petitioners' racially targeted investigation also may not be revealed until resolution of respondents' request for class certification. This suit is a class action seeking equitable relief for a class of Hispanics and Chinese-Americans who have been or will be subjected to criminal investigation solely because they requested bilingual election materials, and a class of persons and organizations involved in voter education projects with Americans of Hispanic and Chinese descent. (First Amended Complaint, ¶ 11). The dismissal by the District Court of the injunctive claims less than three weeks after the complaint was filed removed the focus of the class action aspects of the case at the outset, and no motion for class certification was filed. On remand, respondents will have the opportunity to seek class certification on the injunctive claims, and thus the District Court may have before it a fuller factual record to determine the impact of the investigation. Thus, in *Minnick v. California Department of Corrections*, 452 U.S. at 126, the possibility of a motion for class certification on remand provided grounds for dismissing a writ of certiorari:

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B. The Effect on This Lawsuit of Intervening California Laws Should be Considered for the First Time, If at All, by the Courts Below.

The District Court may also have to address intervening legal developments for the first time in this case. Section 6253.6 of the California Government Code, adopted subsequent to the initiation of petitioners' racially targeted investigation, exempts information concerning voter requests for bilingual ballots from the disclosure provisions of the State Public Records Act and makes it explicit that such information "shall not be deemed to be public records." Because the statute only permits access to these non-public records to public officials "who are responsible for receiving those requests and processing the same," such information will no longer be available to law enforcement officials pursuing a criminal investigation absent a subpoena or court order.

As petitioners conceded in the Court of Appeals,[7] this statute could have an impact on the nature and extent of any further investigation of bilingual ballot requesters, and on its likelihood of recurrence. Petitioners

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> "[I]t is at least possible that claims on behalf of additional employees or job applicants may be asserted on remand. They, as well as the present petitioners, will have the right —even though petitioners' counsel have no such present intent—to adduce additional evidence in support of the complaint . . . ."

[7]In their Suggestion for Full En Banc Rehearing filed in the Court of Appeals on October 8, 1986, petitioners addressed for the first time in this case the significance of this change in California law concerning bilingual ballot requests: "Since that information is no longer public, it would be impossible for the U.S. Attorney again to conduct a similar investigation without court approval." (p. 7).

have argued, and continue to argue, that the investigation was minimally intrusive because it involved only a review of "public records" (Pet. at 19), a characterization which is no longer valid. Furthermore, the fact that further investigations of bilingual ballot requesters would necessitate the use of subpoenas or other lawful process would, even under petitioners' argument, involve "governmental action that is 'regulatory, proscriptive or compulsory in nature.' " (Pet. at 15, 19).

This statute has not been judicially interpreted, and it is not clear what procedures and standards would be necessary to enable prosecutors to use bilingual ballot requests to trigger an investigation, and whether prosecutors would be free to obtain such records for FBI and INS checks as part of a random sample. However, the presence of this statute certainly is a factor which should be addressed for the first time by the District Court on the remand proceedings. *See Rice v. Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70, 76-77 (1955); *see also Minnick*, 452 U.S. at 127 ("the trial judge is unquestionably free to recast his findings in response to those legal developments").[8]

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[8]Another subsequent development may also impact on this case. On November 7, 1986, California voters adopted Proposition 63, an initiative now incorporated as Section 6 to Article III of the California Constitution. Known as the "English Only" initiative, Proposition 63 explicitly provides that English is the "official language of California," and that public officials "shall take all steps necessary to insure that the role of English as the common language of the State of California is preserved and enhanced." (Cal. Const., Art. III, § 6). Beyond that, there is wide disagreement as to the meaning and effect of this constitutional amendment. However, proponents of

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II. PETITIONERS' NEWLY MINTED ARTICLE III ARGUMENT, WHICH WAS NEVER PRESENTED TO THE COURTS BELOW, IS OVERLY BROAD AND INAPPLICABLE TO THIS CASE.

Painting with the broadest possible brush, petitioners now argue for the first time that federal courts have no power to adjudicate any claims arising from law enforcement investigatory activities that have not reached the stage of "mature, coercive governmental action." (Pet. at 17). Petitioners' newly minted Article III argument would apply regardless of whether the claims were equitable or monetary, and regardless of whether a prosecutor was involved in the investigation. (Pet. 17-20). If accepted, law enforcement officials could choose to pursue racially targeted investigations and could use the request for a bilingual ballot as the trigger for such an investigation, and the targets of these actions could never challenge them in a federal court. This far-reaching claim has never been considered by the courts below, the argument itself demonstrates the need for a factual record, and the authorities on which petitioners rely are inapposite.

Although petitioners present an expansive description of the limitations that Article III and separation of

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Proposition 63 have taken the position that it would bar counties who are not mandated by federal law to provide bilingual voting materials from continuing to do so; this would include all the counties affected in the instant case. (Pet. App. at 9a, n.5). This new development may also have to be addressed by the District Court in considering the propriety of equitable relief and the likelihood of a recurrence of the bilingual voter investigation.

power principles place on federal courts in general, and on judicial review of the decisions and actions of prosecutors in particular (Pet. at 12-18), the cases relied on by petitioners have little applicability to the facts of this case. As the petition itself makes clear, the cases cited therein establish the unremarkable principle that courts generally do not review the decision of a prosecutor to prosecute (or not to prosecute), or the decision of what charges a prosecutor should file. Yet this case does not ask a court to assume these prosecutorial functions, nor do respondents seek to enjoin a criminal prosecution. Rather, respondents seek a traditional judicial determination that certain actions of law enforcement officials—targeting a racially-defined segment of the electorate for a criminal investigation and special citizenship verification procedures based on the request for a bilingual ballot—transgress constitutional limits. *Cf. Hall v. Pennsylvania State Police*, 570 F.2d at 89 (police directive to banks to photograph suspicious-looking blacks "facially involve[s] federally protected rights").[9]

Because this case involved a preliminary investigation, and because the actions were taken against randomly se-

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[9]This is not a case in which respondents are asking the court to act "as virtually continuing monitors of the wisdom and soundness of Executive action" (*Laird v. Tatum*, 408 U.S. 1, 15 (1972)), nor seeking "a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties" (*Allen v. Wright*, 468 U.S. 737, 761 (1984)). Rather, the respondents in the instant case are seeking relief in the form of a declaratory judgment and a narrow prohibitory injunction against the use of a facially discriminatory means of criminal investigation and voter citizenship verification. Clearly, this is an area falling well within the "traditional role" of the courts to interpret the Constitution, *Powell v. McCormack*, 395 U.S. 486, 548 (1969), and the courts are familiar with the standards required for decision and competent to fashion a remedy.

lected individuals who were neither criminal suspects nor likely to be charged with any crime, respondents' challenge is far removed from a challenge to a prosecutorial decision of whether to prosecute or how to manage a specific case. The underlying premise of the cases barring review of prosecutorial discretion is that constitutional transgressions can be challenged after indictment in the "ensuing criminal proceeding" (Pet. at 15), thereby guaranteeing that "safeguards built into the judicial process" will serve as "sufficient checks on agency zeal." *Butz v. Economu,* 438 U.S. 478, 512, 516 (1978). Yet by imposing this investigation on a randomly selected group of individuals, petitioners insured that many (or, as it in fact turned out, *all*) of the persons and organizations who were subjected to this special and discriminatory treatment would never be subjected to any criminal proceeding. Thus, petitioners' assertion that Article III stands as an absolute barrier to judicial review of these governmental actions would, if accepted, deprive respondents of the only forum where they can ever seek adjudication of these claims of present and irreparable injuries to fundamental constitutional rights.[10]

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[10]Because of the clear constitutional command against actions by the government premised on the race or national origin of individuals or groups, cases involving facially discriminatory investigations are rare indeed. But when a court is faced with "a governmental directive which calls for a specified activity directed against a group of citizens identified on the basis of race," *Hall v. Pennsylvania State Police,* 570 F.2d at 89, there is no Article III barrier to adjudicating such a claim. Rather, "a criminal investigation directed against the plaintiff because of his race" (*id.* at 91) "facially involve[s] federally protected rights" (*id.* at 89) that lie at the heart of the concerns of the federal judiciary.

Petitioners argue that "anticipatory judicial intervention into the investigative process" will prove unduly disruptive to law enforcement interests. (Pet. at 21). The argument that persons whose fundamental constitutional rights are being abridged by the actions of law enforcement investigators must wait until after indictment to seek a judicial remedy leaves out part of the essential equation that this Court has used in determining whether executive action is ripe for judicial review. This Court has consistently noted that the interest in postponing review until the question arises in some more concrete and final form must be balanced against the "hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). In the instant case, the balance weighs heavily in favor of judicial review. Fundamental constitutional rights are at issue, and there is no doubt that the "effects" of the investigation have been "felt in a concrete way" by respondents. *Id.* at 148-49. Thus, there is nothing premature about respondents' challenge to the injuries that they have suffered and continue to suffer as a result of petitioners' actions. Furthermore, for these respondents there will be no subsequent opportunity or forum to have these claims adjudicated.

Under petitioners' new Article III argument, the nonjusticiability of respondents' claims is premised on the characterization of the investigation as "noncoercive" and as imposing on respondents merely the "expense and an-

noyance of being identified as a witness or suspect in connection with possible criminal activity." (Pet. at 20). This attempt to pigeonhole the investigation as simply "information-gathering and deliberative" (Pet. at 15) flies in the face of the unrebutted factual allegations in the record.

Respondents were singled out solely on the basis of national origin characteristics and their exercise of a statutory right that was expressly enacted for their protection. With no grounds to suspect any individual of any unlawful conduct, law enforcement officials randomly selected individuals of the racially targeted groups and subjected them to record checks by the INS and the FBI to determine their citizenship, and then to questioning by local law enforcement and FBI agents concerning not just their citizenship but also their associational activities. (Pet. App. at 5a). Thus, these procedures not only constituted an investigation targeting national origin groups, but they imposed on respondents procedures and an "affirmative obligation" that no other group of voters had to face. (Pet. App. at 12a, 74a). *See Laird v. Tatum,* 408 U.S. 1, 12 (1972).

Petitioners' racially targeted investigation discouraged members of the organizational respondents from participating in the voter registration drive for fear of being swept up in this criminal investigation. Additionally, citizens in the targeted national origin groups were discouraged from registering to vote, as the very tool created by Congress to facilitate voting became transformed into a

license to institute a criminal investigation. (Pet. App. at 13a, 14a). These injuries,[11] and the actual impact of petitioners' acts, belie petitioners' benign depiction of this investigation, and are among the issues of fact remanded to the District Court. These factual issues should be resolved before this Court considers petitioners' sweeping Article III claim.

III. PETITIONERS' EQUITY ARGUMENTS ARE INAPPLICABLE TO THE INSTANT CASE AND DO NOT PRECLUDE THE DISTRICT COURT FROM CONSIDERING FOR THE FIRST TIME THE PROPRIETY OF EQUITABLE RELIEF.

Again advancing an argument not directly addressed by the courts below, petitioners now assert that equitable

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[11]Petitioners ignore these injuries when they assert that "allegations of 'chill' and 'stigma' are simply inadequate to make governmental action judicially reviewable." (Pet. at 20). In relying on *Laird v. Tatum,* 408 U.S. 1, petitioners ignore the Supreme Court's emphasis on the very limited nature of the claim in *Laird,* in that plaintiffs in *Laird* were basing their First Amendment challenge on "the mere existence, *without more,* of a governmental investigative and data-gathering activity," *id.* at 10-11 (emphasis added), and asserting an injury to their First Amendment rights "caused, not by any 'specific action of the Army against them, [but] only [by] the existence and operation of the intelligence gathering and distributing system.'" *Id.* at 3. Respondents, on the other hand, were the focused targets of the bilingual ballot investigation, and they claim "specific present objective harm [and] a threat of specific future harm." *Id.* at 14.

Also, the investigation in the instant case intentionally and explicitly focused on individuals within two national origin groups. This Court has consistently recognized that stigmatizing members of disfavored groups "as less worthy participants in the political community," *Heckler v. Matthews,* 465 U.S. 728, 739-40 (1984), is "judicially cognizable to the extent that respondents are personally subject to discriminatory treatment." *Allen v. Wright,* 468 U.S. at 757, n.22.

relief can issue only under "extraordinary circumstances" and that "no such extraordinary circumstances exist here." (Pet. at 24). Not only is the legal premise of petitioners' argument flawed, but petitioners' facially discriminatory investigation triggered by the exercise of fundamental rights constitutes sufficient "extraordinary circumstances" to warrant equitable relief.

Petitioners argue that "settled principles of equity jurisprudence" absolutely bar equitable relief as a matter of law (Pet. at 22), and they ground their argument in *Younger v. Harris,* 401 U.S. 37 (1971), and the "*Younger* line of cases" (Pet. at 24). Neither *Younger* nor its "line of cases" has any applicability here.

The primary principle, or "more vital consideration," 401 U.S. at 44, operative in *Younger* was "Our Federalism," or "a proper respect for state functions." *Id.* This principle cannot be relied on by these federal petitioners to insulate themselves from judicial scrutiny.

Petitioners also rely on the other "underlying" principle in *Younger,* namely the restraint against "courts of equity from interfering with criminal prosecutions." *Id.* at 44. Because the rationale for the *Younger* restrictions on equitable relief is "to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted," *id.,* the "*Younger* line of cases" applies when there is a pending prosecution or proceeding. *Steffel v. Thompson,* 415 U.S. 452 (1974) (threat of state prosecution insufficient to invoke *Younger* restrictions). As summarized in *Doran v. Salem Inn,* 422 U.S. 922, 930-31 (1975): "In the absence of [an ongoing state criminal

proceeding], [plaintiffs] . . . were entitled to have their claims for preliminary injunctive relief considered without regard to Younger's restrictions."

The absence of any pending, imminent or threatened prosecution in the instant case means not only that this federal action was not interfering with another proceeding, but also that, from the respondents' vantage point, there was no alternative forum where they could adjudicate their constitutional rights.[12] It is the essence of *Younger* that the injuries are not " 'irreparable' in the special legal sense of that term," 401 U.S. at 46, when a plaintiff can raise the same claims in a pending proceeding (generally the state criminal prosecution). But respondents here are not, and will not be, facing any criminal prosecution, and thus have no forum outside of the federal court to redress the injuries that they suffered and continue to suffer.

Leaping from "a line of cases" concerning the availability of equitable relief in federal court from *pending state prosecutions* to the issue of the availability of equitable relief from *federal criminal investigative activities,* petitioners baldly state that "no lesser restriction on judicial power can apply where noncoercive federal criminal investigative activities are concerned." (Pet. at 23). Thus, as with its prior argument, petitioners are attempting a radical extension of existing law by ripping the *Younger* restrictions from their moorings and underlying rationale and applying them in a completely different context, where

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[12]In fact, Russoniello stated at the outset of the investigation that he had no intention of prosecuting registrants who were illegally registered. (Pet. at 4).

none of the concerns the Court expressed in *Younger* apply.[13]

Even under petitioners' test, it is clear that respondents have alleged facts that are more than sufficient to justify equitable relief from a federal court, and that there is no compelling need for this Court to review this matter prior to the remand proceeding where respondents will have a chance for the first time to develop the factual record with respect to the injunctive claims in this case.

Notwithstanding petitioners' assertion to the contrary, respondents have suffered " 'great and immediate' [injuries] within the meaning of the *Younger* line of cases." (Pet. at 24). In the instant case, a racially targeted segment of the electorate was singled out for a criminal investigation and special citizenship verification procedures, and individuals were randomly targeted based solely on the exercise of their right to request bilingual voting materials. The organizational respondents can demonstrate

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[13]The cases cited by petitioners dealing with federal criminal investigations (Pet. at 24) do not support petitioners' attempt to engraft the *Younger* bar to equitable relief from a federal court onto the facts of this case. In fact, in *Pollard v. Roberts*, 285 F.Supp. 248 (E.D. Ark.), *aff'd*, 393 U.S. 14 (1968), the court issued an injunction against a preliminary investigation by a local district attorney, holding that prosecutorial discretion "does not extend so far as to permit impingement on the associational rights of people on the mere suspicion that the information sought may constitute or lead to evidence that some of the people concerned, or others have violated State election laws." *Id.* at 257-58. Similarly, in *Jones v. Unknown Agents of the Federal Election Commission*, 613 F.2d 864 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), the court noted that injunctive relief was the "appropriate remedy" against that part of a law enforcement investigation of election fraud that included questions delving into the "political beliefs of the individual appellants." *Id.* at 873, n.20.

direct injury to associational interests, including intimidation of members and a decline in participation in voter registration efforts and a decline in registration itself. (Pet. App. at 7a, 13a-14a).

Petitioners try to dismiss these injuries as "reparable" by pointing out the fact that the investigation has terminated. (Pet. at 25). However, the termination of this investigation does not alter the fact that petitioners' investigation has converted a request for a bilingual ballot into a license to commence a criminal investigation, with the resultant and obvious burdens that this has placed on Hispanic and Chinese-American citizens and their organizations with respect to requesting bilingual ballots and participating in the political process. Such facially discriminatory action against persons and groups exercising fundamental voting rights constitutes sufficient "extraordinary circumstances" to warrant equitable intervention by a federal court.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be denied.

Respectfully submitted,

ALAN L. SCHLOSSER*
MARGARET C. CROSBY
EDWARD M. CHEN
ANTONIA HERNANDEZ
E. RICHARD LARSON
DENISE M. HULETT
STEFAN M. ROSENZWEIG
RONALD T. VERA

Attorneys for Respondents

* Counsel of Record